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Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

JOSEPH W. NOWAK,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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TO: *The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.*

The Petitioner, Joseph W. Nowak, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division.

Opinion Below

The Opinion of the United States Court of Appeals for the Seventh Circuit in *United States* v. *Joseph W. Nowak*, No. 18338, was entered on July 26, 1971, but is not yet officially reported. It is printed in the Appendix to this Petition (App. 1).[1]

Jurisdiction

The judgment of the Court of Appeals affirming the conviction in the District Court was entered on July 26, 1971 (App. 14). A timely Petition for Rehearing was denied on October 5, 1971. (App. 15).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. In 1934, when the country was in a state of economic distress, the Congress created the Federal Savings and Loan Insurance Corporation and appropriated $100,000,000 of the Treasury moneys thereto under the apparent power of the welfare clause. When, in 1958, in accordance with the original intent those moneys were entirely repaid, and the Corporation became entirely self-supporting and self-sufficient through the contributions of the privately-owned member savings and loan institutions, does the legislature continue to have power to maintain, and the executive have power to enforce, criminal statutes based on a continuing federal interest in insured Associations, which are State — and not Federally — chartered?

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[1] "App. ....." denotes Appendix to this Petition. "A. ....." refers to printed Appendix on Appeal.

2. Can the bar of the Statute of Limitations be overcome by proof of an event, not charged as an overt act in the indictment?

3. When defense counsel argues to a jury the non-corroboration of an informer, does that justify the prosecutor, replying, to vouch for the informer's integrity, which, otherwise, the Court of Appeals admits would be "highly improper"?

4. When the "highly improper" argument is endorsed by the Trial Judge, is not the prejudice inescapable?

5. During cross-examination of a government principal witness on the very evidence which was allowed to rebut the limitations attack (see 2 above) the Trial Judge stated that "I am beginning to believe it when he [the witness] says it so repeatedly." Can the cure be found in his statements "The jury will disregard whatever I believe. You believe what you want. . . . I have instructed the jury to disregard my belief," and because the Court of Appeals *discovered* "the remark was not to be taken seriously"?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional Provisions

Article I:

Section 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutes Involved

Title 18 U. S. C. 371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18 U. S. C. 657:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insur-

ance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation, or any small business investment company, and whoever, being a receiver of any such institution, or agent or employee of the receiver, embezzles, abstracts, purloins or willfully misapplies any moneys, funds, credits, securities or other things of value belonging to such institution, or pledged or otherwise intrusted to its care, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the amount or value embezzled, abstracted, purloined or misapplied does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

Title 18 U. S. C. § 1006:

Whoever, being an officer, agent or employee of or connected in any capacity with the Reconstruction Finance Corporation, Federal Deposit Insurance Corporation, National Credit Union Administration, Home Owners' Loan Corporation, Farm Credit Administration, Department of Housing and Urban Development, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, or any land bank, intermediate credit bank, bank for cooperatives or any lending, mortgage, insurance, credit or savings and loan corporation or association authorized or acting under the laws of the United States or any institution the accounts of which are insured by the Federal Savings and Loan Insurance Corporation or by the Administrator of the National Credit Union Administration, or any small business investment company, with intent to defraud any such institution or any other company, body politic or corporate, or any individual, or to deceive any officer, auditor, examiner or agent of any such institution or of department or

agency of the United States, makes any false entry in any book, report or statement of or to any such institution, or without being duly authorized, draws any order or bill of exchange, makes any acceptance, or issues, puts forth or assigns any note, debenture, bond or other obligation, or draft, bill of exchange, mortgage, judgment, or decree or, with intent to defraud the United States or any agency thereof, or any corporation, institution, or association referred to in this section, participates or shares in or receives directly or indirectly any money, profit, property, or benefits through any transaction, loan, commission, contract, or any other act of any such corporation, institution, or association, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

This petitioner was charged in one count, of a two count indictment with two other named defendants, and with three alleged co-conspirators, not indicted, under the provisions of 18 U.S.C. 371, that he and they did conspire to defraud the United States and to violate certain laws of the United States as follows:

"(a) to embezzle, abstract, and misapply, and to cause the embezzlement, abstraction, and misapplication to their own use, benefit, and advantage, and to the use, benefit, and advantage of persons other than Service Savings and Loan Association, property of the Association, which was an Institution the accounts of which were insured by the Federal Savings and Loan Insurance Corporation, the defendants Nowak and Szarabajka each then being an officer, agent, employee, and a person connected with the Association in violation of Title 18, U.S.C., Section 657.

"(b) to falsify, conceal, and cover up material facts and to make false, fictitious, and fraudulent statements and representations, and to make and use false writ-

ings and documents, knowing the same to be false, fictitious, and fraudulent, all in matters within the jurisdiction of the Federal Home Loan Bank Board in violation of Title 18, U.S.C., Section 1001.

"(c) to make false entries in the books, reports and statements of Service Savings and Loan Association, with intent to defraud the Association, the United States, and the State of Illinois, and with intent to deceive the officers, auditors, examiners, and agents of the Association and of the Federal Home Loan Bank Board in violation of Title 18, U.S.C., Section 1006.

"(d) to make, pass, utter, and publish false statements knowing the same to be false, for the purpose of influencing the actions of the Federal Savings and Loan Insurance Corporation, in violation of Title 18, U.S.C., Section 1008. (A. 2-3).

As the Court of Appeals noted "Defendant concedes that the proof was sufficient to support conviction of a conspiracy to violate 18 U.S.C. §§ 657, 1006 if Congress has continuing constitutional authority to enforce those statutes and if the statute of limitations has not run" (App. 2, fn. 1).

With that concession, the Court of Appeals made a resumé of the facts in the light most favorable to the government as follows:

"In 1960 Vernon Sherman as an entrepreneur wished to develop a tract of land near Chicago into homesites with an adjoining golf course, swimming pool, and clubhouse to be known as Riverwoods Country Club. To

obtain financing he contacted John Perisich, a mortgage broker, who for a fee agreed to help. Perisich, in turn, contacted Service Savings and Loan Association, a federally insured state-chartered institution in Summit, Illinois. Service agreed to finance the Riverwoods project on the condition that Perisich would arrange with money brokers (persons who for a fee engage in the business of directing deposits of money into a financial institution) to deposit sufficient money in Service for the Riverwoods loan.

"Defendant Nowak was Service's attorney and his co-defendant, William Szarabajka, was its president. During 1961 Nowak worked out the plans for the Riverwoods loan, including the acquisition of the deposits brokered by Perisich, so that Service would have the funds to finance a $3,100,000 loan. One of the reasons for making the loan was to enable Service, from its retention of prepaid interest and other charges, to pay its August 31, 1961 semi-annual dividend to depositors.

"The loan was completed in June 1961 on an appraisal of $8,000,000 placed on the contemplated project by one Mulhern who was told by Nowak to prepare the appraisal on data supplied by Sherman. Sherman refused to submit any information concerning his personal financial responsibility. The actual value of the project approximated $2,500,000. Sherman expended nearly two million dollars of the mortgage money before any construction was started. These expenditures included the payment of an interim mortgage of $1,200,000 which codefendant Morris had arranged and $186,000 to Perisich for obtaining the loan and for payments to money brokers for depositing funds with Service. Sherman also gave Perisich $93,000 in cash from the proceeds of the loan. Perisich in turn handed Nowak approximately $72,000. Because of these and other payments Sherman was left without sufficient funds to complete construction.

"Although no payments were made to retire the loan, Service in January 1963 increased the River-

woods indebtedness by $700,000. This was accomplished by the granting of a new loan of $3,800,000 and the canceling of the original loan. The new mortgage papers were prepared by Nowak. To obtain money for the increased amount, Sherman arranged and paid for brokered deposits to be placed with Service. Edward Szarabajka, Service's vice-president, handled the funds received through the money brokers. In so doing he directed his secretary not to make notations on the depositors' account cards as to the source of the funds, but instead to make secret monthly lists of brokers who sent in deposit accounts. *In March 1964, when regulatory examiners were at Service he repeated his instructions to her to keep the existence of the lists secret, pursuant to directions by both Nowak and president Szarabajka.*[2]

"By 1961 the Federal Savings and Loan Insurance Corporation (FSLIC) considered the use of brokered deposits by savings and loan associations to make loans as against its interests, as such deposits are expensive to acquire, volatile and apt to affect the liquidity of the associations. At that time the Federal Home Loan Bank Board issued a regulation which required insured institutions to report brokered deposits and limited the volume of such deposits to a percentage of an association's total capital.

"The Board, during 1961-1963, directed various inquiries to Service. Nowak as attorney for Service prepared the answers which were then signed by officers of the association. The answers were false in that they recited that Service had no knowledge of commissions being paid to brokers for deposits, that no money broker had been used to obtain funds for the Riverwoods loan, and that Sherman's financial statement had been seen by the defendant in 1961 and found to be satisfactory." (App. 2-4)

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[2] These emphasis are ours and intended to direct the Court's attention to the act of the petitioner found by the Court of Appeals to defeat the limitations plea.

Inter alia, petitioner contended on appeal:

(1) That Congress no longer had authority to continue enforcement of Title 18 U.S.C. § 657 and 1006,[3] as to state-chartered Savings and Loan Associations, which were insured by the Federal Savings and Loan Insurance Corporation, under any of its Constitutionally delegated powers (Article I, Section 8). The Court of Appeals stated our argument in part as "the original constitutional basis for legislation controlling FSLIC . . . (the appropriation of Treasury money) no longer exists —,' the necessary constitutional nexus between state-chartered insured institutions and valid federal criminal legislation touching such institutions is lacking" (App. 4). It was, and is, our collateral argument that the only express power of Congress in 1934 that allowed for the institution of the FSLIC was found in the welfare clause:

> "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to . . . provide for the . . . general welfare of the United States." (Article I, Section 8, Clause 1.)

In accordance with that delegated power it appropriated $100,000,000 to the establishment of the FSLIC. These moneys were repaid into the Treasury in 1958. Since then, the FSLIC has had *no* federal moneys, sustains itself and its employees, and, in fact, sustains the Federal Home Loan Bank Board, from the contributions of the privately owned Savings and Loan Associations. It is our contention, therefore, that the federal interest to support and enforce criminal legislative sanctions no longer exists — and has not since 1958.

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[3] This argument was also directed to 18 U.S.C. § 1008, but since the decision of the Court of Appeals is based on our conditional factual concession as set forth above, this Petition will confine itself to § 657 and 1006, which concession constitutes the factual basis of affirmance below.

(2) That a proved overt act to support conviction over a plea of the Statute of Limitations must be one pleaded by indictment. That portion of the proof that the Court of Appeals found to rebuff the limitations defense is emphasized in the facts as that Court found them and quoted hereinbefore (p. 11). These activities were not pleaded in the indictment. Of this contention, the Court of Appeals said:

> "There was evidence showing that defendant continued to engage in overt acts in February or March 1964. Edward Szarabajka testified that defendant and William Szarabajka instructed him to remind his secretary of the need to keep secret the lists containing the sources of brokered funds. Defendant complains that this overt act was not pleaded. But any overt act by a conspirator may be used to prove the existence of the scheme and that conspirator's connection with it. *See, e.g., Reese* v. *United States,* 353 F.2d 732, 734 (5th Cir. 1965). Once the conspiracy is proved to have continued into the limitations period, any overt act, whether or not pleaded, may be used to show a defendant's connection with the scheme." (App. 10)

We also contended:

(3) That the prosecutor's argument was vastly intemperate, and

(4) The trial judge's remarks expressing belief in one of the two prosecution's principle witnesses and his endorsing as proper the patently improper argument of the prosecutor both violated due process and the basic standards of a fair trial.

For both these later contentions, it is necessary to quote portions of the record. Because some of the judge's remarks are interspersed into the prosecutor's argument, to

avoid repetition, and maintain continuity, they are not separated:

"Q. [Defense Counsel Callaghan] From the time you first gave Elsie Emry these instructions in March of '62 she then continued on doing these things, did she not, that you had instructed her to do in March of '62?

"A. [Gov't Witness Edward Szarabajka] Yes.

"Q. Did the occasion arise for you ever to reinstruct Elsie Emry about it?

"A. Yes.

"Q. When?

"A. In 1964.

"Q. What was the occasion that caused you to reinstruct Elsie Emry about it if she had been doing it continuously since March of 62?

"A. Well, the occasion that caused me was on the instructions of both William Szarabajka and —

"Q. Well, I asked you —

"The Court: Let him finish his answer.

"Mr. Callaghan: I am objecting to his answer.

"The Court: You asked for an answer and you are going to get an answer, whether you like it or not.

"Mr. Callaghan: I now move — you asked Mr. Wolfson if that was a good objection. The objection is good if it comes from the examiner. But the answer he is about to give is not responsive to my question.

"The Court: Well, you haven't permitted him to give an answer so that I can rule on it. You don't like the way it starts and you are not going to let him finish it.

"Mr. Callaghan: Would your Honor let the reporter read the question over again so we both get on the right track?

"The Court: Well, start again.

"Mr. Callaghan: May I have the question read?

"The Court: Read the question, Mr. Reporter.

(Question read.)

"Mr. Callaghan: Now I am asking for the occasion.

"The Court: And he was about to give it to you.

"You may answer the question.

"By The Witness:

"A. On the instructions of both William Szarabajka and Attorney Joseph Nowak.

"The Court: In 1964?

"The Witness: In 1964.

"The Court: There is your answer.

"By The Witness:

"A. (Continuing) In March 1964 or the latter part of February, 1964.

"Mr. Callaghan: I have asked him for the occasion and he said on the instructions of Joseph Nowak.

"The Court: Well, that was an answer.

"Mr. Callaghan: That is not the occasion, Judge.

"The Court: I mean, what could the occasion be, the 4th of July or Callaghan's birthday? What occasion are you looking for?

"Mr. Callaghan: I am looking for him to tell me what the circumstances were that arose that required him to reinstruct Elsie.

"The Court: He just told you.

"Mr. Callaghan: And not to say on the instructions of somebody else. He said that repeatedly.

"The Court: I know, and I am beginning to believe it because he says it repeatedly.

"Mr. Callaghan: Well, if your Honor please, I now move that your Honor instruct the jury to disregard—

"The Court: The jury will disregard what I believe. You believe whatever you want.

"Now let's go on.

"Mr. Callaghan: I now move that you withdraw a juror and declare a mistrial for expressing your belief —

"The Court: Your motion to withdraw a juror and declare a mistrial is denied.

"Mr. Callaghan: — for expressing your belief in the testimony of this witness.

"The Court: I have instructed the jury to disregard my belief. As I told them at the outset of the trial and as I will do at the end of the trial they are to make up their minds as to who they believe.

"The answer that he has given may stand. It is a responsive answer." (A. 43-45)

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Ladies and gentlemen, we have heard that defense before, not too long ago, in other courts in other countries. "I did what I was ordered to do."

Miss Lavin: I object to that, your Honor, I move that it be stricken and that a juror be withdrawn.

The Court: Both motions are denied.

• • •

Government lawyers are not charlatans, as defense counsel would have you believe, and we're not fools. We don't put witnesses on the stand and expect you to believe things just because they said it.

Just a word about calling witnesses. We didn't call Mr. Van Buskirk, we didn't call Vernon Sherman, and they were under subpoena to the Government. So, perhaps, were 50 or 60 other people by both the Government and defense counsel.

Mr. Callaghan: I object to that, if your Honor please.

The Court: Overruled.

Mr. Adlestein: There were all sorts of reasons, ladies and gentlemen, why the Government, the Government of the United States, would decide not to put a witness on the stand.

The law is, ladies and gentlemen, that when a party puts a witness on the stand, he vouches for what that person says. He stands behind his testimony as to truth. That's why the —

Miss Lavin: Object to that, your Honor, vouching for the veracity of the witnesses.

The Court: That isn't the law?

Miss Lavin: It may be the law, but it is improper argument.

The Court: The objection is overruled. (A. 61)

• • •

Of the Trial Court's remarks, the Court of Appeals said:

> "The judge's expression of belief in the witness' answer was not prejudicial. As far as we can discover from the transcript, the remark was not intended to be taken seriously. This was not a 'definite and concrete assertion of fact . . . made with all the persuasiveness of judicial utterance" such as the Supreme Court considered in *Quercia* v. *United States,* 289 U.S. 466, 472 (1933). Further, the judge immediately instructed the jury that whatever he believed should be ignored by them. We do not believe this 'expression of belief' could possibly have influenced the jury." (App. 11-12).

No observation at all is made to the Judge's endorsing the improper government argument.

Of the prosecution argument, the Court of Appeals said:

> "Although it is arguable that this statement might have been interpreted by the jury as an expression of the prosecutor's personal belief in the honesty of those witnesses who had testified for the Government, which would be highly improper, we think that it was meant, and could logically be interpreted, as merely a response to the argument made by defense counsel regarding the lack of corroboration of the witness Perisich. An advocate is permitted considerable latitude in replying to his opponent's arguments. *United States* v. *Lawler*, 413 F.2d 622, 628 (7th Cir. 1969), *cert. denied*, 396 U.S. 1046 (1970). Accordingly, we do not consider the statement so prejudicial as to require a reversal." (App. 12-13).

Thus while the Court found error in some of the statements and avoided reference to the Court's endorsement, it was able on the imputation of good intentions to the prosecutor to find it to be not "so prejudicial." No observation at all is made to the argument of the prosecutor that the jury had heard the defense "in other courts in other countries. " 'I did what I was ordered to do'."

REASONS FOR GRANTING THE WRIT

This Court should issue its Writ of Certiorari to review the within decision of the United States Court of Appeals for the Seventh Circuit on the following grounds:

1. The continued enforcement of criminal statutes (18 U.S.C. 657 and 1006) as they relate to state-chartered Savings and Loan Insurance Corporations, is no longer supported by any Constitutionally endowed legislative power. The legislation originally (1934) was based on an appropriation of moneys of the public Treasury under the Welfare Clause, under a design for orderly repayment. The appropriation has been fully repaid and retired since 1958, and the Corporation has, from its inception, been fully supported, by contributions of private moneys from member associations.

Where, as here, the basis of the legislative authority has been dissipated and no longer exists, but severe criminal penalities for violation of the legislation continue to be imposed, a question arises as to whether such legislation can be enforced compatibly with the Constitution.

It is a serious question which has not been, but should be, decided by this Court.

2. This decision negates the proposition that a proved, but *uncharged* overt act cannot be the basis for extending limitations on prosecution. As such it is not in accord with this Court's decision in *Brown* v. *Elliott,* 325 U.S. 322 and is in direct conflict with the Fifth Circuit decision in *Pinkerton* v. *United States,* 145 F.2d 252 respecting the same subject matter.

3. The Court of Appeals for the Seventh Circuit held that the prosecutor's expression of his personal belief in the honesty of the Government's witness was arguably "highly improper" but the net effect of the opinion was to hold that when defense counsel argues to a jury the non-corroboration of an informer, the prosecutor is justified in supplying corroboration by vouching for the informant's credibility. This opinion is not in accord with this Court's decision in *Lawn* v. *United States,* 355 U.S. 339, 359 (n. 15) and in conflict with the Second Circuit decision in *United States* v. *Gruenberger,* 431 F.2d 1062 and the Fifth Circuit decisions in *Gradski* v. *United States,* 373 F.2d 706 and *Hall* v. *United States,* 419 F.2d 582, at 586.

4. When the trial court, by its remarks, endorsed a summation by the government, which, according to the Court of Appeals, is arguably "highly improper," and when the trial court's expressions of belief in the prosecution's main witness on *the* pivotal issue is excused by the Court of Appeals on the rationale that "it was not intended to be taken seriously "by the jury, this Court's power of supervision is called into play, equally with this Court's discordant decisions in *Quercia* v. *United States,* 289 U.S. 466, 472; *Starr* v. *United States,* 153 U.S. 614, 626; and *Bollenbach* v. *United States,* 326 U.S. 607, 612. It is also in direct conflict with the 3rd Circuit decision in *United States* v. *Link,* 202 F.2d 592, 595; the 2nd Circuit decision in *United States* v. *Grunberger,* 431 F.2d 1062, 1068; the 5th Circuit's decisions in *Bursten* v. *United States,* 395 F.2d 976, 982-3 and *Zebouni* v. *United States,* 266 F.2d 826, 827; the 6th Circuit decision in *United States* v. *Kelly,* 314 F.2d 461, 463-4 and the District of Columbia Circuit in *Gudger* v. *United States,* 314 F.2d 268, 269.

I.

The Federal Savings and Loan Insurance Corporation (hereinafter referred to as FSLIC) has a history which is, lamentably, too seldom repeated in government legislation.

Created for the purpose of alleviating a pressing social need, $100,000,000 of the Treasury's moneys were appropriated to the purpose of financing the creation of that institution.

But with a Solomon-like wisdom, recognizing that private industry should support itself, and that government, while obligated to rise to meet pervasive social problems, should not perpetuate itself to the end that private industry should be strangled by a competitive government force, it provided for the gradual and orderly reimbursement of the appropriation as it also provided that FSLIC should be self-sustaining. The FSLIC, having supported itself from the inception, all overhead coming from earnings and not as a drain on the tax dollars of the citizenry, finally, in 1958, had reimbursed the United States Treasury to the full extent of its $100,000,000 "lift" given in 1934. (Title IV of the National Housing Act)

No longer funded by government money, no public moneys appropriated to it, FSLIC operates as a well organized private industry, supported and owned by the organization it insures. Its insurance liability is backed by its own assets.

Thus, FSLIC has emerged from the shelter of its protector and stands independent. It shares this distinction with yet another organization, the Federal National Mortgage Company (Fanny May). The distinction between the two former government "instrumentalities" is the re-

stricted ownership of FSLIC, and the unrestricted ownership of Fanny May.[4] Of the former government sponsorship of these two corporations, only two indicia of government remain: the name "Federal" and the overseeing of an executive appointee.

In the case of FSLIC, the executive appointee is the Federal Home Loan Bank Board (hereinafter referred to as FHLBB).[5] Unlike the executive appointee overseeing Fanny May (Secretary of Housing and Urban Development George Romney), the FHLBB is supported entirely by the private owners of FSLIC.

Thus, it becomes apparent that the original constitutional basis for legislation controlling FSLIC by the Congress of the United States (the appropriation of Treasury moneys) no longer exists. Clearly within its law-making powers at the beginning and during the course of the loan retirement, Congress no longer has Constitutional power to regulate the FSLIC, and has not had since 1958.

To this argument, the United States Court of Appeals for the Seventh Circuit makes several replies. Undoubtedly the most compelling is the enactment by Congress in 1950 of 12 U.S.C. §1725(i) which authorized FSLIC to borrow up to $750,000,000 from the United States Treasury. Thus the Seventh Circuit argues that the United States does have a financial stake in FSLIC in the form of contingent liability. To this rationalization, we pro-

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[4] Fanny May became a private corporation in 1968. It is traded on the New York Stock Exchange. It is owned by some 7,300 private shareholders. *Time,* December 7, 1970, pp. 91, *et seq.*

[5] It is noteworthy, in connection with this argument that the United States assumes no liability on Federal Home Loan Bank notes.

pose that Congress does not have power to bind a future Congress—now twenty-one years later—to an appropriation, and so we argued below. The Seventh Circuit to this argument, stated:

> "While it is true Congress cannot insure future appropriations, it has not attempted to do so but has simply authorized loans. This authorization remains effective until repeal." (App. 6 fn. 4)

But it would be clearly unconstitutional to spend—or *lend*—monies not appropriated by Act of Congress. Article I, Section 9, Clause 7 of the Constitution.

The Court of Appeals' second resolution of the argument is that our submission that the United States "no longer owns" FSLIC is without merit, because Congress has designated FSLIC as a "wholly owned Government corporation," 31 U.S.C. §846, and also that the Congress has the right to use whatever form it wishes to the accomplishment of the legislative purpose. We submit this bends the question.

We have no argument with the availability to the Congress of utilizing whatever form it deems most appropriate to exercising its powers, be they corporations, agencies, or instrumentalities. Our questions are: (1) What happens to these corporations, agencies, and instrumentalities when the power of Congress sought to be exercised no longer exists; (2) Is a contingent possibility of future appropriation, not authorized in the 38 years of existence sufficient to perpetuate federalism; (3) Does the designation of FSLIC by the Congress as a "Wholly owned Government corporation" (31 U.S.C. §846) persevere, even though admittedly that is not the fact?

We contend a corporation cannot continue to be "wholly owned" when it is obviously not the fact.

The attorney for the government admitted on oral argument in the Court below, under probing questioning by that Court, that if the FSLIC were dissolved, its funds would be returned to the member Savings and Loans because of their interest in them. In this regard, see also this Court's recent decision in *Commissioner of Internal Revenue* v. *Lincoln Savings and Loan Association,* 91 S.Ct. 1893.

If "ownership" does not exist in reality, the mere fashioning of words do not make it so.

It then becomes a question as to whether its nature makes it an agent or instrumentality of the United States, and for that we must look to the substance of the FSLIC. Perhaps nothing is more demonstrable of the existence or nonexistence of a fact than a parallel.

On December 30, 1970, President Nixon signed The Securities Investor Protection Act of 1970, into law. This established the Securities Investors Protection Corporation.

The Act, in purpose and intent, was to form a corporation that would perform in the field of securities the same function as does the FSLIC in the savings and loan field. This is made clear from Senator Muskie's report from the Committee on Banking and Currency to accompany the proposed bill on presentation to the full Senate:

> "The Security Investors Protective Corporation (SIPC), like the Federal corporations that ensure savings and demand deposits, is intended to serve several purposes: to protect individual investors from financial hardship; to insulate the economy from the disruption which can follow the failure of major financial institutions; and to achieve a general upgrading of financial responsibility requirements of brokers and

> dealers to eliminate, to the maximum extent possible, the risks which lead to customer loss."

In its argument to sustain federal jurisdiction on the ground that FSLIC and, if you will, FHLBB, is an agency and instrumentality of the United States, the Government argued as follows:

> "The Corporation may insure state-chartered savings and loan associations and may act as the conservator of an insolvent state institution which it has insured (12 U.S.C. 1926(a), 1729(cc))."

The provisions of the SIPC provide virtually the same function. See Section 35(m).

Following as is its announced intention, the new S.I.P.C. provides for financing by its member organizations. (See Section 35(e)).

If the Court finds this comparison onerous, it is to come to probably what should have been set forth at the beginning. The capacity of this Corporation, expressly fashioned on the FSLIC is declared at the inception of the act of its creation:

> "The Corporation [S.I.P.C.] shall *not* be an agency or instrumentality of the United States of America."

This is so despite the fact that serving on its Board of Directors, by legislation, are:

> 1. Five directors appointed by the President of the United States by and with the advice and consent of the Senate, three of which are associated with the Securities industry;
>
> 2. An appointment of the Secretary of the Treasury from among the officers and employees of that department.
>
> 3. An appointment of the Federal Reserve Board from among the officers and employees of the Board.

It is still not an agency or instrumentality of the United States of America.

It is no diminishment of—nor refusal to recognize—the powers of Congress in espousing this argument. The Supreme Court has been viligant in refusing to recognize enactments by Congress of those statutory presumptions that are refuted by facts, and contrary to human experience.

It is with no intent to diminish the power of Congress, but rather to enhance the value of our constitution, that we propose this argument to this Court. An expanded federalism does not serve the purposes of, nor contribute to the strength and individualism of this great country. Though Mr. Justice Holmes used stronger language than we would be disposed to in evaluating this question the purport of his statements are peculiarly appropriate to this argument.

> "[I]t is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists through blind imitation of the past." *Holmes, Collected Legal Papers* 187 (1920)

The Court of Appeals relied upon several cases (App. 7) and particularly *Smith* v. *Kansas City Title & Trust* Co., 255 U.S. 180. However, the *Smith* case is in exactly the same posture as of the date of that writing as was FSLIC when originally adopted as an emergency measure. As the Court knows, there were in that case, public monies deposited with the individual banking institutions, and the Congress used those individual banking institutions as effective disbursement agents of those public monies to assist in the relief of drought victims. There

the facts were that public monies *were* involved and these were land banks created and established by the federal government for the disbursement of those monies. Not so, the State chartered Savings and Loan Associations.

Certainly when the Federal Savings and Loan Insurance Corporation was founded with its hundred million dollars of government funds, it had the potential to be a fiscal agent. That does not obtain here, where no "fisc" or public monies are longer involved.

We are mindful of the fact that this Court has an obligation to uphold enactments of Congress reasonably related to its powers, but we suggest that the efforts of the Court of Appeals have extended the constitutional powers of the Congress. That Court held:

> "Congress may use necessary and proper means of promoting the general welfare, and if money is needed for that purpose, Congress may use public funds. But it is wrong to suggest that if certain steps in aid of the public welfare may be taken without the use of such funds, Congress is powerless to take those steps." (App. 7)

Promoting the general welfare is not the defined power of Congress, it is the laying and collecting of taxes to promote the general welfare that defines that power. (Article 1, §8, Clause 1) It is the power to tax that is in Congress, and the promotion of the general welfare is the guide for that power. The promotion of the general welfare does not stand alone.

The Court of Appeals concluded:

> "Congress' judgment that FSLIC should be available to act as a fiscal agent of the government is sufficient in itself to support continuing government regulation of FSLIC's operations." (App. 8)

We suppose that any individual could be made, under this reasoning, a potential "fiscal agent"—though never used for that purpose, though never really conscientiously intended for that purpose, though the need for the purpose was not foreseeable. We submit that this is a loose interpretation of the powers of Congress, and as such, an encroachment of the Ninth and Tenth Amendments, reserving the rights, privileges, and liberties to the people and to the state.

We present this argument not only on behalf of this petitioner, but in the sure belief that an ever expanding federalism, on the sheerest pretext, must destroy the vitality of the purposes for which this country was established.

When asked, on argument, counsel for the government were unable to pinpoint the perpetuation of FSLIC as an arm of government in any defined power granted by the constitution. The opinion of the Court of Appeals has indicated no way to do so.

It is our firm opinion that this country was not founded to compete with its citizens in private industry. Rhetorically we ask why, because of an unforeseeable contingent possibility, a federalist giant, can fairly compete with private industry—subject to no taxes—trading, as we have demonstrated in stocks against private initiative.

We are reminded of a recent interview of the late Mr. Justice Black of the Supreme Court, who, carrying about a dog-eared pamphlet of the United States Constitution said, in effect, "I might have written it differently, but it is our obligation to adhere to it until it is changed."

II.

There is no question that the Court of Appeals for the 7th Circuit understood our complaint on this account. Finding the limitations covered in proofs that in February or March, 1964, Edward Szarabajka testified that the petitioner and Edward's brother instructed Edward to direct and remind his secretary of the need to keep secret the list containing the sources of brokerage funds, that Court found the charged conspiracy to extend into the limitations period. Recognizing our complaint that this "overt act" was not pleaded in the indictment, that Court makes the novel rule of law that "any overt act by a conspirator may be used to prove the existence of the scheme and that conspirator's connection with it," relying on *Reese* v. *United States,* 5 Cir., 353 F.2d 732, 734.

The *Reese* case, upon which authority the Seventh Circuit relies, has no relation to extending the statute of limitations by the proof of an overt act. It merely stood for the proposition that overt acts, not charged in the indictment may properly constitute part of the proof of the existence of the charged conspiracy. The Seventh Circuit, in this decision, is the *first* to hold that the Statute of Limitations, in a conspiracy case, can be governed by an overt act proved but not charged in the indictment. It stands alone in holding that "any overt act whether or not pleaded, may be used to show defendant's connection of the scheme," and inescapably implies that the overt act need not be pleaded to define time limitations. This is a drastic inroad on prevailing law, as set forth in this Court's decision in *Brown* v. *Elliott,* 225 U.S. 392; *Pinkerton* v. *United States,* 5 Cir., 145 F. 2d 252, and *United States* v. *Albanese,* S.D.N.Y., 123 F. Supp. 732, affirmed, 224 F. 2d 879.

This decision of the Seventh Circuit is one of great significance. Upholding the decision would mean that there

exists authority to preclude effective attack upon a conspiracy case on account of its being outlawed by time prior to having to stand trial therefor. No plea of the Statute of Limitations could ever be made to a conspiracy charge. This is an unprecedented encroachment of what has been heretofore considered a defendant's right so far as criminal outlawry by time is concerned. We submit that this Court should grant its writ to the end that this erroneous conviction be rectified, and to the end that future prosecutions, in the important area of limitations, should not constitute trial by surprise. In fact, we submit that since overt acts in a conspiracy charge are the only measure to judge the time element that the decision is violative of the Sixth Amendment that an accused be apprised of the nature and cause of the accusation against him.

III.

The subject matter of our complaint under this point is set forth in total from the record in the Statement of the Case hereinbefore. There is no question that the closing argument of the prosecutor to the jury was a forthright vouching for government witnesses. It wasn't even implied. It wasn't even a reasonable inference. The very words "vouch for" were used by the prosecutor. If a prosecutor's vouching for his witnesses is error, as we believe the authorities establish without reservation that it was, than a clearer illustration of such error could not be proposed. The Seventh Circuit admits that it is "arguable" that an "interpretation" should be one of the prosecutor's personal belief in the honesty of these witnesses who had testified for the Government, and, as such, "highly improper". We submit there is no other interpretation, and even "arguable" recognition of that fact should have required reversal.

The Court of Appeals, however, excuses this plain deviation from proper conduct, because it also arguably might be response to the argument of defense counsel that one of the two main witnesses for the government was not corroborated. It would seem then that the logical interpretation is that an uncorroborated government witness, who secured probation because of his *cooperation*, is invulnerable to attack, at the expense of having him corroborated by the prosecution's closing argument—where no evidentiary corroboration exists. Comment on the fact that an informer witness' testimony stands alone would justify the prosecutor vouching for that informer, where, otherwise, such a vouching would be "highly improper". This decision is in such basic conflict with other decisions of other Circuits that even a minimal glossary of those decisions will demonstrate that high impropriety that the Seventh Circuit recognized but excused. The Fifth Circuit in *Gradsky* v. *United States*, 373 F. 2d 706, 710, recognized in a similar statement that it implied that the government had run a check on the principal witness and determined he was speaking the truth. Many cases recognize that such a statement presented an issue to the jury—that of the validity of the prosecutor's opinion—on which there was no evidence to justify a resolution of the issue. *Greenberg* v. *United States*, 1st Circuit, 280 F. 2d 472, 474-75; *Hall* v. *United States*, 5 Cir., 419 F. 2d 582, 586; and even the Seventh Circuit's decision in *United States* v. *D'Antonio*, 362 F. 2d 151, 155.

We are somewhat confused by the Seventh Circuit's excuse, what the vouching for might *arguably* have been. Only shortly before this, the same Seventh Circuit in *United States* v. *Handman*, No. 18736, July 1, 1971, stated:

> "The question is not whether the prosecutor meant 'to insinuate' that his statement was based on personal knowledge. The question is what the jury probably thought."

Further, as to the Court's disposition that the "other allegedly improper remarks by the prosecutor . . . need not be identified or further discussed," because they "were even less likely to have prejudiced the defendant . . ." (App. 13), may we suggest that the proper frame of reference to be gleaned from the cold record is the reaction the remark evoked. An immediate motion to withdraw a juror was made. As the Court knows, defense counsel also don't have an advance script and, as persons there, the gauge of the response is to be taken into consideration in what would have "influenced the jury". We suggest that "we have heard that defense before, not too long ago, in other courts, in other countries. 'I did what I was ordered to do' " is unmistakable in its intendment, and unmistakable in its resulting influence on the jury.

We submit that the Court has over-indulged the harmless error theory in this cause.

This, we say particularly, when the Court itself recognizes that a prejudicial interpretation could have been put on the argument.

IV.

Of the Trial Court, two salient complaints are made. The first is inextricably interlocked with the next. After the prosecutor had vouched for his witness, objection was promptly made. His vouching was somewhat in the frame of "we vouch for witnesses we put on the stand." Upon objection, the Court stated as follows:

> "The Court: That isn't the law?
>
> "Miss Lavin: It may be the law, but it is improper argument." (A. 61)

Of course the Court overruled the objection. The Court of Appeals, though it recognized that vouching for the government informer could be "highly improper", it does

not heed the fact that the trial judge at the very time the vouching was made said not only that it was highly proper, but that it reflected the state of the law. Thus the prosecutor testifying to the veracity of this witness was bolstered by the Trial Court, as a proper thing for the prosecutor to have done. Thus, the jury must have considered his unsworn testimony of his evaluation of the informer as credible, a proper matter for them to consider. All of this concerned the testimony of the Government informer Perisich.

The Government's other informer witness was Edward Szarabajka. During his cross-examination on the *very evidence* which the Court of Appeals found rebutted the limitations attack (the overt act not charged; see Point II above), the Trial Judge stated that "I am beginning to believe it when he says it so repeatedly." And upon objection, and a motion to withdraw a jury, the Court said, "The jury will disregard whatever I believe. You believe what you want. . . . I have instructed the jury to disregard my belief." There can be no doubt that such remarks by a Trial Judge—particularly in the context of this case—constitute reversible error. As this Court said, "The influence of the Trial Judge on the jury 'is necessarily and properly of great weight,' and 'his slightest word or intimation is received with deference, and may prove controlling.' " *Quercia* v. *United States,* 289 U.S. 466 at 470, and Courts have consistently recognized that instructions given in the charge to the jury that they are the sole judges of the credibility of the witnesses cannot remove an impression so created. *United States* v. *Desisto,* 289 F. 2d 833, 835.

That it constituted error cannot be denied. But the United States Court of Appeals for the Seventh Circuit said that having examined the record on the whole *it discovered* that the remark "was not intended to be taken

seriously." We submit that this characterization of the remark of the judge, which immediately evoked a request to withdraw a juror, is not supported by the record. But aside from that, it appears to indulge the Court as humorous and tends to contradict the established doctrines concerning the care with which a Judge must speak on trial. In *Quercia,* of course, this Court defined such remarks as definite and concrete decision of fact "made with all persuasiveness of judicial utterance." *Quercia* v. *United States,* 289 U.S. at 472. The Third Circuit in *United States* v. *Link,* 202 F.2d 592 urged that Trial Judges keep in mind the effect of any statements which they make in the course of the trial, (202 F. 2d at 595) and this Court in *Starr* v. *United States,* 153 U.S. 614 admonished trial courts that their lightest word or information is received with deference, and may prove controlling. (153 U.S. at 626) It repeated its admonition in *Bollenbach* v. *United States,* 326 U.S. 607, saying that jurors are ever watchful of the words that fall from the trial judge and that his last word is apt to be the decisive word. (326 U.S. at 612)

There is probably no court at an appellate level that has not noticed the high sensitivity of jurors to every utterance of a trial judge and that his comments may be so highly prejudicial that no matter how strong the admonition the error is beyond rectifying.

CONCLUSION

Wherefore, for the above and foregoing reasons, this petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN, JR.
Attorneys for Petitioner
Joseph W. Nowak